BEFORE THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 819

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

JOSEPH C. MCGARRAGHY,
Counsel for Petitioner,
Tower Building
Washington 5, D. C.

WILKES, MCGARRAGHY & ARTIS
Of Counsel.

Printed by Law Reporter Printing Co., 518 5th St., Wash., D. C.

INDEX

Subject Index

CASES CITED

BEFORE THE

Supreme Court of the United States

OCTOBER TERM 1944

No. .....

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

To the Honorable, the Chief Justice and the Associate Justices:

The petition of Central Dispensary and Emergency Hospital respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This is a proceeding upon the petition of the National Labor Relations Board filed in the United States Court of Appeals for the District of Columbia for enforcement of the Board's order issued against the Central dispensary and Emergency Hospital, located in the District of Colum-

bia, directing the hospital to bargain with Building Service Employees' International Union, A. F. of L., as the exclusive bargaining agent of the hospital employees within a designated bargaining unit.

In proceedings before the Board, the hospital made two principal contentions against issuance of the threatened order, namely, (1) that the hospital is not subject to the National Labor Relations Act, and (2) that the Board's certification of the Union as the employees' bargaining agent was improper because it was based upon an election at which less than a majority of eligible voters cast ballots and, therefore, the union had not been designated "by the majority of the employees" as required by the Act.

These two points were renewed by the petitioner in the proceeding brought in the United States Court of Appeals for the District of Columbia together with a third point, namely, that, by reason of changed conditions since the date of the election, the Court should not order the hospital to bargain with the union. In support of this third contention it was shown by affidavit that out of a total of 251 employees who were eligible to vote in the election, only 43 remain at the hospital at the present time and, therefore, the union should not stand certified as the employees' bargaining agency, at least until these present employees are given an opportunity to vote on the matter.

The petitioner contends that it is not subject to the National Labor Relations Act because it is a non-profit charitable institution not engaged in trade, traffic, commerce or transportation within the meaning of the Act.

The Court of Appeals held that the activities of the hospital constituted trade and traffic and "the fact that they are carried on by a charitable hospital is immaterial to a decision of this case." The Court relied upon its decision in *American Medical Association* v. *United States*, 76 U. S. App. D. C. 70, 130 F. (2d) 233, in which it held that the sale of medical and hospital services constitutes trade within the meaning of the Sherman Act.

However, the Court ignored the fact that when this Court reviewed the convictions in the American Medical Association Case, 317 U. S. 519, 528, and one of the questions presented was "whether the practice of medicine and the rendering of medical services as described in the indictment are 'trade' under Sec. 3 of the Sherman Act" this Court did not pass upon the question in affirming the judgment and said "we need not consider or decide this question."

Thus, we still have unanswered by this Court the basic question in the present case: "Does the rendering of medical and hospital services by a charitable hospital and for a fee constitute trade?"

The decision of this point is of real significance. It is agreed that the present is the first instance of a hospital over which the National Labor Relations Board has asserted jurisdiction. However, the decision below is so broad that, if permitted to stand, it would constitute authority for the assertion of jurisdiction over charitable hospitals throughout the country.

In a comment on the decision, the Prentice-Hall Labor Letter of November 24, 1944 said, "Nearly every hospital purchases supplies in other states" and "Although directors of hospitals and other charitable institutions may regard their work as purely local they should remember that U. S. Supreme Court decisions have pushed the line distinguishing national from purely local activities so far that, according to the 7th CCA, "only a mirage lies beyond'."

The second question which we ask this Court to review relates to whether there has been a compliance with the Statute (Sec. 9(a)) providing for designation of bargaining agents "by the majority of the employees" in the appropriate unit. (See appendix for statute.)

In this case, out of 251 eligible voters, only 108 cast ballots and of this number only 75 were for the union.

In sustaining the election, the lower Court relied upon the decision of this Court in *Virginian Railway Company* v. *System Federation No. 40,* 300 U. S. 515, 560. However,

in that case, a majority of the eligible voters participated. This was not so in the present case.

The Court also referred to certain other Federal decisions, but, as pointed out in the accompanying brief, the facts in each of those cases were entirely dissimilar from those here being considered. In every instance, there was evidence of actions by the employer to discourage the employees from voting, thus bringing about the situation of which the employer subsequently claimed the advantage.

The third question for review is whether the hospital should be required to bargain with the union when there now remains in the employ of the hospital only 43 out of the total of 251 employees who were eligible to vote in the election.

B.

Reasons Relied on for the Allowance of the Writ.

A Writ of Certiorari should be granted under subdivision 5(c) of Rule 38 of this Honorable Court for the following reasons:

1. The United States Court of Appeals for the District of Columbia has decided a question of general importance which has not been, but should be, settled by this Court.

2. The United States Court of Appeals for the District of Columbia has decided a question of substance relating to the construction or application of a statute of the United States which has not been, but should be, settled by this Court.

3. The United States Court of Appeals for the District of Columbia has not given proper effect to an applicable decision of this Court.

WHEREFORE, your petitioner respectfully prays that the writ of certiorari be issued out of, and under the seal of, this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, to the end that the decision of the United States Court of Appeals for the

District of Columbia, rendered in the case numbered and entitled on its Docket No. 8786, National Labor Relations Board, Petitioner, v. Central Dispensary and Emergency Hospital, Respondent, be reviewed and determined by this Honorable Court; and your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

JOSEPH C. MCGARRAGHY,
Counsel for Petitioner.

Before The

Supreme Court of the United States

October Term 1944

No. .....

Central Dispensary and Emergency Hospital,
Petitioner,

v.

National Labor Relations Board,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION BELOW.

The opinion of the United States Court of Appeals for the District of Columbia has not yet been reported. It was delivered on November 13, 1944, and will be found on pages 135 to 139 of the record. The docket number of this case in the United States Court of Appeals for the District of Columbia is 8786.

II.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia was entered November 24, 1944.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code, as amended (28 U. S. C. Sec. 347 (a)).

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading "A" of the Petition for Writ of Certiorari filed herewith, and, in the interest of brevity, is not repeated here.

IV.

SPECIFICATION OF ERRORS.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the petitioner's activities constitute trade and traffic and that it is subject to the National Labor Relations Act.

2. In sustaining a certificate based upon an election at which less than a majority cast their ballot.

3. In holding irrelevant evidence which would establish that out of a total of 251 employees who were eligible to vote in the election only 43 remain at the present time.

V.

THE QUESTIONS INVOLVED.

1. Is the petitioner, a non-profit charitable institution, rendering medical and hospital services, engaged in "trade

and traffic" within the meaning of the National Labor Relations Act?

2. Is a certificate of election valid when based upon only the vote of a majority of a minority?

3. Should the petitioner be ordered to bargain with the union when, by reason of changed conditions, it is shown that only 43 employees remain out of the 251 employees who were eligible to vote in the election?

VI.

ARGUMENT.

Petitioner Is Not Subject to the Act.

The hospital is a charitable institution. Approximately 33% of the hospital services are rendered for less than cost and the whole operation of the hospital is without profit.

Hospitals frequently are placed in the same grouping as churches, orphan asylums, industrial schools, and the like. As was said in the case of *St. Louis Union Trust Co.* v. *Oregon Annual Conference*, 14 Fed. Supp. 35, 40, "It is common knowledge that hospitals are considered next after churches as legitimate objects of church ownership."

In the case of *People* v. *Powers*, 147 N. Y. 104, 110, the Court said:

> "We think we may take judicial notice that in the prominent cities of our State there are numerous organized charities that are not incorporated, as well as those that are incorporated. What are they? Hospitals, homes for the friendless, industrial schools, orphan asylums, aged female societies, and children's homes are common names in every city with which we are familiar."

Circuit Judge Parker in the case of *Ettlinger* v. *Trustees of Randolph Macon College*, 31 Fed. (2d) 869, 970, quoted

from Blackstone that "The eleemosynary sort of corporations are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them, to such persons as he has directed. Of this are all hospitals for the maintenance of the poor, sick and impotent, and all colleges both in our universities and out of them."

Dealing with the question of whether an institution would be considered charitable even though it makes a charge for services, Judge Parker said:

> "It is clear that a corporation is to be deemed eleemosynary or charitable where its property is derived from charitable gifts or bequests and is administered, *not for the purpose of gain*, but in the interest of humanity; and an educational institution, established and endowed by private charity, falls within the classification. (Dartmouth College Case and others cited). And it is equally clear both that *the eleemosynary or charitable nature* of an educational institution *is not destroyed* by the fact that it makes a charge for tuition, and that the payment of tuition by its students does not prevent their being considered beneficiaries of the charity. * * These principles are settled by the overwhelming weight of authority." (Italics supplied.)

In *New England Sanitarium* v. *Stoneham*, 205 Mass. 335, 342, in which it was shown that 1 7/100ths per cent were free patients, 4 7/100ths per cent were part paying patients, and the balance, or approximately 95% paid the full rate, the Court held that the sanitarium was a charitable institution and on this subject, said:

> "The increase of charitable funds, through receipts from patients or inmates who are able to pay wholly or partially for benefits received, does not change a home for aged people, or hospital, organized and conducted as a charity, into a private association, maintained for the pecuniary advantage of the promoters. The original eleemosynary character of the institution is not transformed by this patronage, even if sufficient to relieve it from financial burdens, but the charity as established remains unaffected."

In *Roosen* v. *Hospital*, 235 Mass. 66, Chief Justice Rugg used the following language:

> "That the defendant is a public charitable corporation established for the care of sick and indigent persons is not controverted. *The fact that it receives compensation from some of its patients does not affect in any respect its character or liability as a public charity.* All such payments are devoted exclusively to charitable uses and not at all for private gain." (Italics supplied.)

Also see *Tucker* v. *Association*, 191 Ala. 572, 598, as follows:

> "It is a well known fact, of which Courts may take judicial notice, that many of the most noted institutions of this country for the treatment of the sick were established by endowments, are not operated for profit, accept charity patients, and are such as come within the definition of charitable institutions laid down in the books."

We next come to our contention that as a charitable institution, the petitioner is not engaged in trade, traffic, commerce, transportation, within the meaning of the National Labor Relations Act.

A definition by Mr. Justice Story in the case of *The Nymph* (C. C.) Sumn. 516-518, Fed. Cas. No. 10388, has been frequently quoted. His language was:

> "Wherever any occupation, employment or business is carried on for the purpose of *profit, or gain, or a livelihood*, not in the liberal arts or the learned professions, it is constantly called trade." (Italics supplied.)

In *U. S.* v. *Keystone Watch Co.*, 218 Fed. 502, the Court held that "trade" was the business of buying and selling *for gain.*

Other Federal decisions to the same effect are *U. S.* v. *Cassidy*, 67 F. 698; *U. S.* v. *Coal Dealers Assn.*, 85 F. 252;

U. S. v. *U. S. Steel Corp.*, 223 F. 255; *National League* v. *Federal Baseball Club*, 259 U. S. 200; *Hood Rubber Co.* v. *U. S. Rubber Co.*, 229 F. 583.

There are a number of state cases, one of them being *Campbell* v. *Union*, 151 Minn. 220, in which the Court said:

> "It seems clear to us that the only logical conclusion is that the word has been used in its broadest sense, and includes business of any kind in which a person *engages for profit.*" (Italics supplied.)

The respondent relies upon the cases of *U. S.* v. *American Medical Association*, 72 App. D. C. 12, 110 F. (2d) 703, certiorari denied 310 U. S. 644, and *American Medical Association* v. *U. S.*, 76 App. D. C. 70; 130 Fed. (2d) 233.

It is to be noted that when the question came to this Court on certiorari, 317 U. S. 519, 528, and one of the questions to be passed upon was whether the practice of medicine and the rendering of medical services as described in the indictment constituted "trade" under Sec. 3 of the Sherman Act, this Court did not pass upon that question in affirming the judgments. Thus, this Court has not yet decided whether or not the practice of medicine constitutes trade under the Sherman Act.

City of Rochester v. *Rochester Girls' Home*, 194 N. Y. S. 236, 237, held that a charitable home for girls was not a "business, trade or industry."

Easterbrook v. *Hebrew Ladies' Orphan Society*, 85 Conn. 289, 298, 82 Atl. 561, 564, held that a charitable home for the aged was not a business within the sense of a restrictive covenant.

Lawrence v. *Nissen*, 173 N. C. 359, 364, 91 S. E. 1036, held that a municipal ordinance declaring hospitals for profit to be nuisances does not discriminate in favor of charitable hospitals as the distinction is reasonable. The Court held that charitable hospitals are not "businesses."

In the case of *Western Pennsylvania Hospital, et al.* v. *Lichliter*, 340 Pa. 382, 387, 17 Atl. (2d) 206, 209, 132 A. L. R.

1136, the question involved was whether the State Labor Relations Act applied to twenty-five non-profit charitable hospitals, which filed a bill in equity to enjoin the Pennsylvania Labor Relations Board from proceeding against them under the Labor Relations Act. The first question presented was whether the Trial Court had jurisdiction to issue an injunction in view of the Pennsylvania Labor Anti-Injunction Act relating to a labor dispute involving persons who were engaged "in a single industry, trade, craft or occupation." The Court held that a hospital is not an industry and giving the words "industry, trade, craft or occupation" their commonly accepted meaning, they do not include the operations of a hospital.

The Court further held that the Legislature did not intend such a result; that the purpose of the Act was to preserve the status quo during labor disputes; that the effect of unionization and attendant efforts to enforce demands would involve results far more sweeping and drastic than merely property rights; that the question of profits for the employer or wages for the employee were not alone involved; that it could not conceive that the Legislature intended to include hospitals within the purview of the Act and that even though the words used might conceivably be broad enough to include a hospital, nevertheless a hospital was not within the spirit of the Act and, not being within the spirit, the Act does not apply to it.

As authority for this proposition, the Court quoted from *Holy Trinity Church* v. *U. S.*, 143 U. S. 457, 12 Sup. Ct. 511, as follows:

> "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers. This has been often asserted, and the Reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator; for frequently words of general meaning are used in a statute, words broad enough to

include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

The Court pointed out that hospitals are scientific institutions created for humane purposes in amelioration of the sufferings of mankind. They require for their successful operation highly skilled physicians, surgeons, technicians, experts and nurses. They likewise require the services of other persons, some of whom may be skilled and some unskilled, but the whole must be coordinated, controlled and uninterrupted to accomplish the general purpose. This would be impossible should the Labor Relations Act be held applicable with all its attending ramifications, interruptions and possible cessation of service due to labor disputes and attending financial inability to function.

The case of *Jewish Hospital of Brooklyn* v. *Doe, et al.*, 300 N. Y. S. 1111, was a suit to enjoin the union and certain of its officers from interfering with the conduct and operation of the hospital which was a charitable hospital supported mainly by patients of the City of New York and by contributions from other sources. The question involved was whether or not under the statute depriving state courts of jurisdiction to issue injunctions in cases involving or growing out of labor disputes the Trial Court had jurisdiction to issue an injunction. The Court held that even though the anti-injunction statute did not expressly exempt charitable corporations from its operation, the Legislature never intended it to apply to institutions such as the plaintiff hospital. Those involved in the dispute must be engaged in the same "industry, trade, craft or occupation." These words connote and emphasize one common thought, that the parties to the controversy shall be engaged in the same business, enterprise or commercial pursuit, "*one party motivated by the desire for profit,* the other by the desire to

earn a livelihood." The hospital was not thus engaged nor were its sponsors or supporters motivated by any selfish or pecuniary consideration and the Court held that obviously the hospital was not engaged in any industry, trade, craft or occupation for profit within the meaning of the statute.

The Court further held that when the hospital supplied care to so-called free patients it was in fact, if not in name, a governmental agency performing a governmental function which ordinarily belongs to and is usually discharged by the state. And in conclusion, the Court said that its determination that charitable corporations were not meant to be included within the statute finds support in the history of labor struggles for shorter hours, increased wages and better working conditions.

> "The conflict which is almost as old as labor itself, always was between those whose capital *was invested in business for profit* and those whose efforts contributed to the earning of profits. Therefore, it is reasonable to assume in the absence of express language to the contrary that in enacting the statute the Legislature had in mind industrial and commercial enterprises organized for profit and the labor controversies and litigations incident to their operation and not nonprofit charitable institutions such as plaintiff hospital." (Italics supplied.)

In the case of *State Labor Relations Board* v. *McChesney*, 27 N. Y. S. (2d) 866 (New York, 1940), 27 N. Y. S. (2d) 870 (New York, 1941), the New York State Labor Relations Board applied to the Supreme Court to confirm its determination against McChesney who owned and operated a private hospital conducted for profit requiring him to bargain collectively with his hospital service and maintenance employees. The respondent challenged the jurisdiction of the Board largely on the ground that the intent of the New York Legislature was to control labor relations in industry and he contended that his hospital was not engaged in industry. However, the Court held that the Act covered

"labor conditions in any field of employment where the objective is the earning of a livelihood on one side and the gaining of a profit on the other." The respondent called attention to the fact that the Labor Board admitted it had no jurisdiction over employees of a voluntary hospital, arguing that there should be no distinction in this respect as against a private hospital inasmuch as their functions in the care of the sick are identical, but the Court said that "judicial decision has indicated a distinction between the two types of institution" and after referring to the decision in *Jewish Hospital of Brooklyn* v. *John Doe, supra,* the Court said that the argument advanced by the respondent in this respect "could be employed with equal force by a large milk corporation claiming that it performs the same function as a charitable organization devoted to the free distribution of milk" and, therefore, the Court concluded that although *charitable hospitals were exempt from the Act,* private hospitals conducted for profit were not.

The case of *Northwestern Hospital* v. *Public Building Service Employees Union,* 208 Minn. 389, 294 N. W. 215, although relied upon by the respondent does not in fact support its contentions. In that case the Court was required to interpret the Act of the Legislature giving the State Labor Conciliator jurisdiction in the case of a dispute in any "industry, business or institution affected with the public interest." The Court there held that "a hospital such as the plaintiff corporation operates is generally regarded as an institution in the community. *It is not a business or industry* but it is concerned with the well being of the people." (Italics supplied.) From this quotation, it will be seen that the Court based its decision upon the finding that the hospital was an institution. It expressly found that the hospital was not a business or industry.

The Board's Certification Is Improper.

The election report (App. p. 92-93) shows that there were 251 employees on the eligible list; that only 108 ballots were

cast; that only 101 ballots were counted; that only 75 votes were cast for the union. In other words, only 40.2% of eligible votes were counted and only 29.9% of the total number of eligible employees voted for the union.

Section 9-a of the National Labor Relations Act provides that "representatives designated or selected for the purposes of collective bargaining by *the majority of employees* in a unit appropriate for such purposes shall be the exclusive representative of all the employees of such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

It seems to us that the language is clear that the representatives must be selected "by the majority of employees." Certainly a union selected by less than 30% of the employees should not have the right to speak for all.

The Court of Appeals sustained the election on the authority of *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 560. We respectfully urge that, in this respect, the Court did not give proper effect to that decision.

In that case, the trial court expressly held *invalid* an election as to a craft where less than a majority of those eligible to vote actually voted. It sustained the election in other crafts by a majority of voters where a majority of those eligible to vote actually participated. *It did not sustain a certificate based upon the vote of the majority of a minority.* (See *System Federation No. 40* v. *Virginian Railway Co.*, 11 Fed. Supp. 621.)

It was from this ruling that the decision of the trial court was first affirmed by the Circuit Court of Appeals, Fourth Circuit, 84 Fed. (2d) 641, and then by this Court.

It seems to us that it is an authority directly contrary to its application by the Court of Appeals.

The other cases cited by the Court are readily distinguished.

In the case of *New York Handkerchief Manufacturing Co.* v. *National Labor Relations Board*, 114 Fed. (2d) 144, the

principal issues involved related to various alleged unfair labor practices with respect to which the Board was sustained. While it is true that less than a majority of the eligible voters cast their ballots, the Court sustained the election because the Board found "that petitioner was guilty of coercion and intimidation against its employees, which, no doubt, prevented many of them from participating in the election." The Court pointed out that it does not follow that the Board could justify itself in the exercise of such authority in every case regardless of the number who participated in the election and said:

> "In the instant case, as found by the Board, petitioner, by its unlawful conduct, interfered with the right of its employees to participate in the election and, no doubt, was responsible for the small proportion of the employees voting. *Under such circumstances*, we are of the opinion that the Board not only was within its authority, but was justified in concluding that the union was the proper representative." (Italics supplied.)

Even under the circumstances recited above, the Court stated that:

> "The authority of the Board to certify the union under such circumstances presented an important question, not free from doubt."

To the same effect is the case of *National Labor Relations Board* v. *National Mineral Co.*, 134 F. (2d) 424. In that case the company was accused of anti-union activity and refusal to cooperate in the holding of the election. Prior to the election the Board sent twenty-five copies of the election notice to the company to be posted in its plant. The company refused to post them. The company agreed to furnish a copy of the payroll for the guidance of the Board in conducting the election but failed and refused to do so. On election day, supervisory employees gathered near the vot-

ing place and kept the employees under surveillance, all of this with the result that less than a majority of the employees voted. The Court found that the company was "a flagrant violator of the provisions of the Act" and said that its prejudicial conduct was so apparent that it never attempted in its brief or in oral argument to defend its conduct and after summarizing the various acts committed by the company, the Court said:

> "You have a totality of opposition by the company to the efforts of its employees to organize that warranted the Board in finding *that the company's conduct was an interference with the election and was responsible for the small number voting.*" (Italics supplied.)

In the case of *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474, again we have a situation where the employer had been guilty of acts of intimidation particularly wage cuts which "necessarily discouraged the employees in maintaining their connection with and representation by the union."

In *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 F. (2d) 586, the election was sustained on the grounds that *more than a majority* of the eligible voters participated in the election and the Court pointed out that "under the Railway Labor Act it has been authoritatively held that a vote of the majority of the participants determines the choice, *if the election was participated in by a majority of the employees entitled to vote.*"

We submit that none of the cases cited above are authorities on the proposition before this Court. There is no evidence or suggestion that the respondent hospital did anything to interfere with the rights of the employees voting and it is clear that *the election was not even participated in by a majority of the employees eligible to vote.*

By Reason of Changed Conditions This Court Should Not Order the Hospital to Bargain With the Union on the Basis of the Certification of December 26, 1942.

Even if it should be determined that the petitioner is subject to the jurisdiction of the National Labor Relations Board, and, further, that the certification based upon the election was valid, nevertheless we urge that changed conditions since the election are such as to require the Court to refuse to issue the order of enforcement.

In the Court of Appeals, we submitted an affidavit showing that of the 251 employees who were eligible to vote at the election conducted on October 21, 1942, only 43 employees are now in the employ of the hospital. If we assume that all 43 originally voted for the union and would do so now, that number represents only about 17% of the total number of employees. We submit that under such circumstances, the hospital should not be required to bargain with the union.

In *National Labor Relations Board* v. *Fan Steel Metal Corporation*, 306 U. S. 240, 83 L. Ed. 627, the Court held that an order of the National Labor Relations Board requiring an employer to bargain collectively with a certain labor organization as the exclusive representative of the employees in a certain unit is improper where, as a result of the lawful discharge of participants in a sitdown strike, new men had been employed and it does not appear that such organization is still the choice of a majority of the employees as their representative. (See headnote 7.) The Court said:

> "The Board's order properly requires respondent to desist from interfering in any manner with its employees in the exercise of their right to self organization and to bargain collectively through representatives of their own choosing. But it is a different matter to require respondent to treat Lodge 66 *in the altered circumstances* as such a representative. If it is contended that Lodge 66 is the choice of the employees,

the Board has abundant authority to settle the question by requiring an election." (Italics supplied.)

It is true that in some instances the Court has held that even though a majority has turned to a minority in the course of time, the Court will enforce the original Board's order. These cases are distinguishable, however, in two respects, first, the union never had a majority in the pending case and, second, in the pending case, there is no suggestion of intimidation, coercion, or other unfriendly attitude upon the part of the employer designed to bring about the changed conditions.

In the case of *National Labor Relations Board* v. *Bradford Dyeing Association*, 310 U. S. 316, 343, 84 L. Ed. 1226, the Court held that a shift in membership from an affiliate of a national union to a rival company union did not operate to change the representative character of the national union *where the shift was due to unfair labor practices of the employer in persuading and coercing the employees to change over to the company union.*

In *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U. S. 512, 86 L. Ed. 380, the Circuit Court of Appeals had directed that the Board's order be modified so as to require it to conduct an election to determine whether the certified union had lost its majority due to a shift of employees to a rival independent association. This Court reversed, holding that "the Board had considered the effect of a possible shift in membership, alleged to have occurred subsequent to Lorillard's unfair labor practices but it had reached the conclusion that in order to effectuate the policies of the Act, Lorillard must remedy the effect of its prior unlawful refusal to bargain by bargaining with the union shown to have had a majority on the date of Lorillard's refusal to bargain."

We submit that the Lorillard case is easily distinguishable for there, the Board had considered the effect of a possible shift in membership. In the pending case there has

not been a shift in membership, but even if what has taken place should be treated as a shift, it has not been considered by the Board.

In the case of *Franks Bros. Company* v. *National Labor Relations Board*, 64 S. Ct. 817, Vol. 88 L. Ed. Advance Opinions, page 773, the Court found many instances of unfair labor practices including "an aggressive campaign against the union even to the extent of threatening to close its factory if the union won the election" and, therefore, sustained the order of the Board requiring the company to bargain with the union which represented a majority of the employees prior to the unfair labor practices.

VII.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the decision of the United States Court of Appeals for the District of Columbia be reversed and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia and finally reverse it.

JOSEPH C. MCGARRAGHY,
Counsel for Petitioner.

APPENDIX

National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151 *et seq.*).

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial

obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2.

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other

State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an

appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

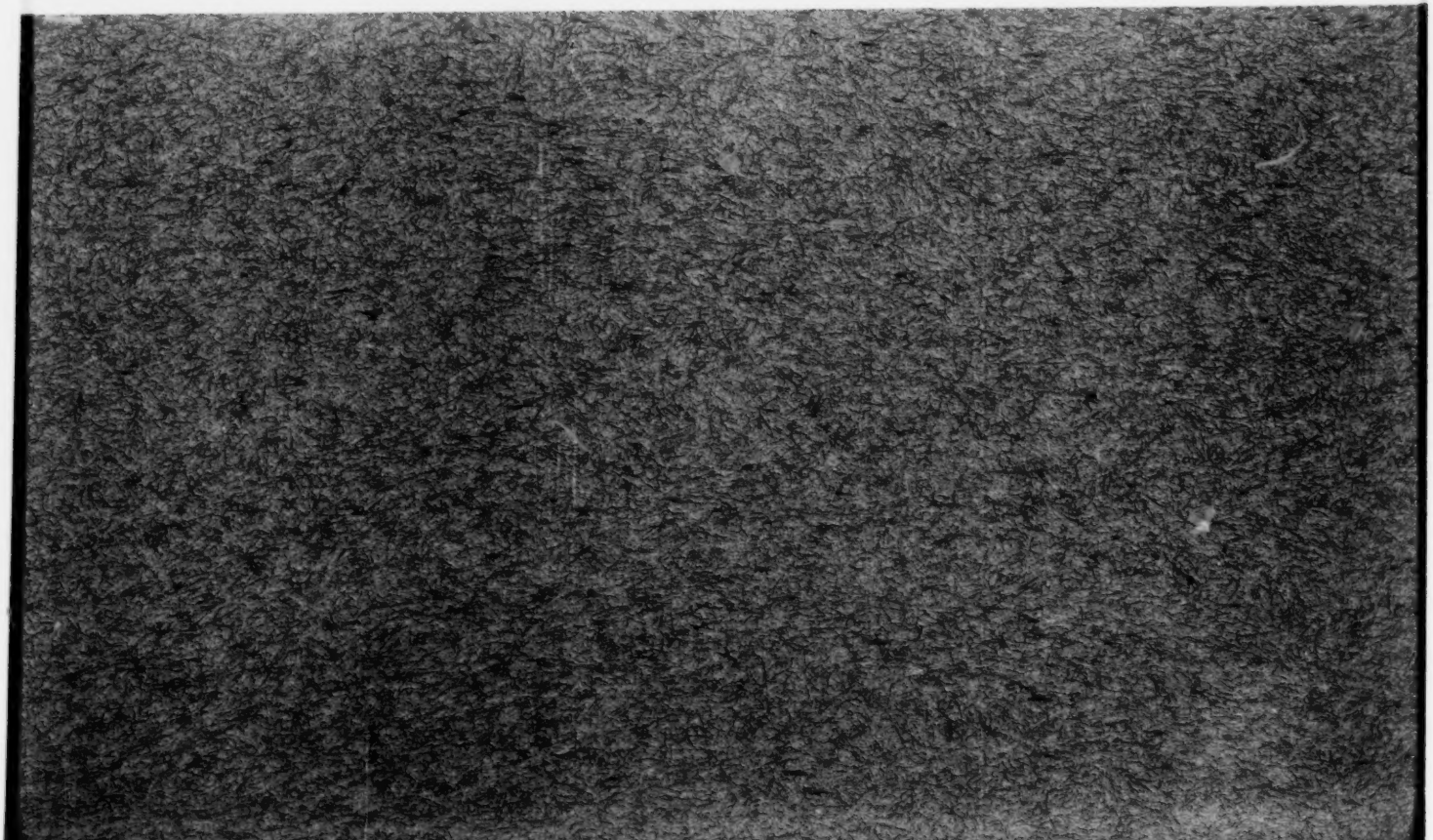
(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order.

* * *



INDEX

CITATIONS

628929—45——1

Cases—Continued. Page

Miscellaneous:

Constitution and Statute:

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 819

CENTRAL DISPENSARY AND EMERGENCY HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 134–138) was issued on November 13, 1944, and has not yet been reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 116–127) are reported in 50 N. L. R. B. 393. The decisions of the Board in a prior representation case which forms a part of the record in this case (R. 65–80, 94–96) are reported in 44 N. L. R. B. 533 and 46 N. L. R. B. 437.

JURISDICTION

The decree of the court below (R. 139–141) was entered November 24, 1944. The petition for a writ of certiorari was filed January 6, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the unfair labor practices of a nonprofit hospital in the District of Columbia affect commerce within the meaning of the Act.

2. Whether the Board may properly order petitioner to bargain with a labor organization which was certified by the Board as collective bargaining agent for petitioner's employees on the basis of an election in which less than a majority of the employees in the bargaining unit cast ballots.

3. Whether the court below properly denied petitioner's motion to adduce additional evidence to show that subsequent to the election a number of the employees who had been eligible to vote therein left petitioner's employ.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix (*infra,* pp. 18–22).

STATEMENT

A. PETITIONER'S BUSINESS

Petitioner, an association of private individuals incorporated in the District of Columbia, maintains and operates one of the largest hospitals in the city of Washington (R. 120; 10).[1] Although the hospital was incorporated under articles which recite the object of the association to be the gratuitous provision of medical and surgical service to needy persons, the hospital at present does only a negligible amount of pure charity work where no fees are charged, and collects what it can from indigent cases. (R. 122; 49–50, 52–53.) The hospital building contains 280 beds in private and semi-private rooms and in wards; a portion of its floor space is leased to a firm of private physicians who there operate X-ray equipment (R. 120; 10, 15, 37). The hospital provides facilities to treat medical and surgical cases (excluding contagious and obstetrical cases) and it maintains and operates a dispensary, an emergency room, and two ambulances (R. 120; 10, 13–14, 19). It employs approximately 120 professional and 230 non-professional employees (R. 120; 23–24).

---

[1] References preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

In 1940, petitioner's gross income for the treatment of patients amounted to approximately $595,000 (R. 120; 30, 90). Approximately 50 percent of this sum was derived from private patients, as to whom petitioner made a substantial profit (R. 121; 12, 53, 81, 90); approximately 30 percent was secured from patients who come to it pursuant to workmen's compensation and group health contracts, as to which petitioner makes little or no profit (R. 121; 18–19, 31–33, 53, 90), and the remaining 20 percent was derived from services rendered patients pursuant to agreements with the District Health Department, the Health Security Administration, and the Washington Community Chest, as to which petitioner sustains a loss of about 50 percent (R. 121; 28, 31, 90). Petitioner receives $6,600 annually for rental of floor space for X-ray purposes referred to above (R. 120; 15–16, 37) and derives further income from a parking lot, gifts and endowments, and investments (R. 120; 24–25, 85–86). In 1940, petitioner made an operating profit of $717.85 (R. 121; 26, 82). In 1941, it sustained an operating loss but more than compensated for this loss from its investments and from its operating fund surplus, so that its books showed a net profit for that year (R. 121–122; 26–27, 82, 83).

Petitioner purchases supplies at a cost of approximately $20,000 per month (R. 120; 22, 83–

84). Between 25 and 35 percent of these purchases are shipped directly to the hospital from points outside the District of Columbia and the balance is purchased from local dealers who, in turn, received the goods from outside sources (R. 120–121; 38–41).

Approximately 10 percent of the patients treated by petitioner come from Maryland and Virginia (R. 120; 10, 88).

B. THE BOARD'S CERTIFICATION OF THE UNION AND PETITIONER'S REFUSAL TO BARGAIN

On October 21, 1942, the Board, pursuant to its Decision and Direction of Election in a representation proceeding under Section 9 of the Act (R. 122; 65–80), initiated upon the petition of Building Service Employees International Union, AFL, herein called the Union, conducted a secret ballot election among petitioner's non-professional and non-technical employees, whom the Board found constitute an appropriate bargaining unit (R. 123; 78–79, 92–93). Of the 251 employees eligible to vote in the election, 108 cast ballots, of which 75 were for the Union and 26 against (R. 123, footnote 4; 93). The Board, after having satisfied itself by investigation that the election was fair and the balloting representative of the wishes of the unit (R. 95), on December 26, 1942, certified the Union as the exclusive bargaining representative of the employees in the unit (R. 123; 94–96).

628929—45——2

On December 31, 1942, the Union, by letter to petitioner, requested a collective bargaining conference (R. 123–124; 101–102). On January 15, 1943, petitioner refused the request on the ground that it was not subject to the Act (R. 124; 102–104). Thereafter, petitioner also claimed that the Union was not entitled to bargaining status because "less than a majority of the total eligible voters participated in the election and only 30 percent cast their ballots for the union" (R. 114, 115).

On June 11, 1943, pursuant to a charge filed by Union, and following the usual proceedings pursuant to Section 10 of the Act, the Board issued its findings of fact, conclusions of law, and order (R. 116–127), in which it found that petitioner had violated section 8 (1) and (5) of the Act. It ordered petitioner to cease and desist from its unfair labor practices, to bargain collectively with the Union, and to post appropriate notices (R. 116–117).

On June 9, 1944, the Board filed with the court below a petition for enforcement (R. 4–7). On October 16, 1944, immediately after the argument before the court below, petitioner filed with the court a motion to adduce additional evidence, supported by an affidavit setting forth that as of that date, of the 251 employees who had been employed and eligible to vote in the election of October 21, 1942, only 43 were still employed by petitioner (R. 128–129). On November 13, the court denied the

motion (R. 133) and handed down its decision enforcing the Board's order in full (R. 134–141).

ARGUMENT

1. Petitioner's contention that it is not engaged in "trade" or "commerce" and hence not subject to the jurisdiction of the Act presents no question warranting review by this Court.[2] Petitioner's operations, described above, pp. 3–5, amply attest the fact that it is engaged in the sale of medical and hospital service on an extensive scale, in connection with which it purchases large quantities of supplies and employs a large, permanent staff of both professional and non-professional employees. A portion of its income is derived from the leasing of real estate which it owns to commercial firms. Such activities constitute trade, traffic, and commerce within the common understanding of these terms. In *Jordan* v. *Tashiro*, 278 U. S. 123, this Court considered the question of whether the operation of a general hospital was included within the words "trade" and "commerce" as used in a treaty with Japan authorizing Japanese subjects in the United States to carry on "trade" upon the same terms as native citizens. It held that it was

[2] Congress, in the exercise of its plenary power over the District of Columbia (Art. I, Sec. 8, U. S. Constitution, see *infra*, p. 23), has made subject to the Act employers engaged in trade or commerce within the District of Columbia (Section 2 (6), quoted *infra*, p. 20).

so included; that "the operation of a hospital as a business undertaking * * * is a commercial purpose," and that such activity was included within the meaning of the "terms 'trade' and 'commerce,' when used in conjunction with each other and with the grant of authority to lease land for 'commercial purposes.'" 278 U. S. 123, 128, 129.

The Court of Appeals for the District of Columbia in *United States* v. *American Medical Association,* 110 F. (2d) 703 (App. D. C.), certiorari denied, 310 U. S. 644, in a long and careful opinion pointed out (at pp. 706–711) that the practice of medicine has been considered "trade" under the English and American common law since early times, and held that the restraint of the business of a hospital and of Group Health Association, Inc., a membership association which procured hospital and medical service for its members, constituted a restraint of trade within the meaning of the Sherman Act. In a subsequent decision, *American Medical Ass'n* v. *United States,* 130 F. (2d) 233, upon a second appeal of the case, the court held (at pp. 236–238) that the rendering of hospital and medical services by certain hospitals in Washington, including petitioner herein, together with Group Health Association, constituted "trade" within the meaning of the Sherman Act. Upon appeal to this Court, *American Medical Association* v. *United States,* 317 U. S. 519, the Court (at p. 528) considered that the form of the indict-

ment rendered unnecessary a decision of the character of the service rendered by physicians but affirmed the holding of the lower court that the procuring of medical services by Group Health Association constituted trade.

Petitioner's contention that the Act was not intended to apply to the hospital as a charitable, non-profit making institution is without merit. It is well settled that the non-profit character of an enterprise does not remove otherwise commercial activities from the field of commerce, and that the limits of the commerce power are not fixed by the existence of a narrowly "commercial" motive or profit incentive. *Caminetti* v. *United States*, 242 U. S. 470; *Gooch* v. *United States*, 297 U. S. 124; *Covington and Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204; *United States* v. *Hill*, 248 U. S. 420; *United States* v. *Simpson*, 252 U. S. 465; *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678 (C. C. A. 8). In *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128–129, the Court stated that the determination whether an enterprise is engaged in commerce is "unaffected by the fact that the [enterprise] * * * does not operate for profit," and it specifically held that cooperative, non-profit organizations are not exempt from the Act. See also *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643; *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board*, 109 F. (2d)

76 (C. C. A. 9), certiorari denied, 310 U. S. 632; *National Labor Relations Board* v. *Grower-Shipper Vegetable Ass'n*, 122 F. (2d) 368 (C. C. A. 9); cf. *American Medical Association* v. *United States*, 317 U. S. 519, 528. Indeed, Section 2 (2) of the Act expressly identifies labor organizations when acting as an employer as subject to the Act, although labor organizations may be organized on a non-profit basis.

Nor does the fact that petitioner is a hospital remove it from the scope of the statute. Congress expressly excepted some types of employers and employees from the coverage of the Act. Hospitals and their employees are not included within such exceptions, and there is no basis in the Act or its legislative history for reading such an exception in to it.[3] The court below therefore properly held that petitioner was engaged in trade and

[3] Petitioner (Pet. 14–16) points to state court decisions in Pennsylvania and New York holding that so-called charitable hospitals perform governmental functions, and hence are not subject to the labor relations acts of their respective States. *Western Pennsylvania Hospital, et al.* v. *Lichliter*, 340 Pa. 382, 387, 17 Atl. (2d) 206, 209; *Jewish Hospital of Brooklyn* v. *Doe et al.*, 300 N. Y. S. 1111); *State Labor Relations Board* v. *McChesney*, 27 N. Y. S. (2d) 866, 27 N. Y. S. (2d) 870. But see *Northwestern Hospital* v. *Public Building Service Employees' Union*, 208 Minn. 389, 294 N. W. 215; *Wisconsin Employment Relations Board* v. *Evangelical Deaconess Society of Wisconsin*, 242 Wis. 78, 7 N. W. (2d) 590, in which the Supreme Courts of Wisconsin and Minnesota, respectively, held that the state labor relations acts of these States applied to hospitals.

commerce within the meaning of the Act and was subject to the jurisdiction of the Board.

2. The court below properly sustained the Board's certification of the Union [4] upon the basis of a majority vote cast in an election in which less than a majority of the eligible employees participated. It is clear from the legislative history of the Act that Congress, in providing in Section 9 (a) of the Act (quoted *infra*, p. 21) that "representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees * * * for the purposes of collective bargaining * * *" intended the selection of such representatives to be made by the majority vote of those participating in the selection. Congress prior to the Act had adopted this principle in the Railway Labor Act.[5] It had likewise been applied in industries outside the railway industry by the President's Executive Order No. 6580, in which the President, on February 1, 1934,

[4] The validity of the Board's certification was, of course, an issue before the court in the proceeding for review or enforcement of the Board's order directing petitioner to bargain with the Union. Section 9 (d); *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 459.

[5] Section 2, Fourth, of the Railway Labor Act (45 U. S. C., Sec. 152 (4)) provides, in part: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." The Report of the Senate Committee

implemented Section 7 (a) of the National Industrial Recovery Act, by providing for the conduct of elections by the National Labor Board and for the certification of representatives designated by the majority of those voting in such election.[6] The Report of the House Committee on Labor on the bill which became the Act stated that "* * * the bill is merely an amplification and further clarification of the principles enacted into law by the Railway Labor Act and by section 7 (a) of the National Industrial Recovery Act, with the addition of enforcement machinery of familiar pattern."[7]

The principle of selection of representatives by a majority of those voting was judicially confirmed by this Court in *Virginia Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, in construing Section 2, Fourth, of the Railway Labor Act. The Court's opinion stated (300 U. S. at 560):

---

on Interstate Commerce which accompanied the bill stated that "the bill specifically provides that the choice of representatives of any craft shall be determined *by a majority of the employees voting on the question.*" (italics supplied). Report No. 1065, 73rd Cong., 2nd Sess., p. 2.

[6] Executive Order No. 6580, February 1, 1934, provided, *inter alia*, for the certification by the National Labor Board of "representatives who are selected by the vote of at least a majority of the employees voting and have been thereby designated to represent all the employees eligible to participate in such an election for the purpose of collective bargaining or other mutual aid or protection in relation to their employer."

[7] House Report No. 1147, 74th Cong., 1st Sess., p. 3.

> Petitioner construes this section [2, Fourth] as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election [citing cases]. Those who do not participate "are presumed to assent to the expressed will of the majority of those voting [citing cases]."
>
> We see no reason or supposing that Section 2, Fourth, was intended to adopt a different rule. * * *

The circumstance that in the *Virginian Railway* case a majority of those eligible to vote participated in the election is not material. The rule governing political elections, upon which the Court relied and which Congress had in mind in establishing majority rule under this Act, makes no distinction based upon the number of participants. In *Carroll County* v. *Smith,* 111 U. S. 556, cited by this Court in the *Virginian Railway* case, only about one-third of those eligible to vote participated, but it was held that the statutory provision requiring the assent of two-thirds of the qualified voters had been satisfied.

In *St. Joseph Township* v. *Rogers,* 16 Wall. 644, where only a minority of those eligible to vote participated, this Court held (p. 664) that "the legislature in adopting the phrase 'a majority of the legal voters of the township,' intended to require only a majority of the legal voters of the township voting at the election."

The Board and the courts have uniformly followed the principle of the *Virginian Railway* case in cases under the National Labor Relations Act. *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board,* 114 F. (2d) 144, 148–149 (C. C. A. 7), certiorari denied, 311 U. S. 704; *National Labor Relations Board* v. *National Mineral Co.,* 134 F. (2d) 424, 426–428 (C. C. A. 7), certiorari denied, 320 U. S. 753; *National Labor Relations Board* v. *Whittier Mills Co.,* 111 F. (2d) 474, 477–478 (C. C. A. 5); *Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. (2d) 586, 588 (C. C. A. 2), certiorari denied, 313 U. S. 594; *Matter of Western Foundry Co.,* 42 N. L. R. B. 302; *Matter of Spring City Foundry,* 11 N. L. R. B. 1286; *Matter of R. C. A. Mfg. Co., Inc.,* 2 N. L. R. B. 159, 173–179. There are no contrary decisions.[8]

3. The denial by the court below of petitioner's motion to adduce evidence of a change of personnel subsequent to the election presents no

[8] As noted in the Board's certification of the Union in the instant case (R. 95), the Board has as a matter of administrative discretion limited the application of the principle of

question of importance for the review of this Court. Such evidence, even if adduced, would be immaterial to the decision of the issues in the case. There is no allegation that the changes in personnel resulted in a loss of the Union's majority. Moreover, this Court has held upon numerous occasions that even a loss of the union majority among employees subsequent to an election but pending the employer's compliance with an order of the Board to bargain cannot operate to change the employer's duty to comply with the order. *Frank Bros. Company* v. *National Labor Relations Board,* 321 U. S. 702; *National Labor Relations Board* v. *P. Lorillard Co.,* 314 U. S. 512; *International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 82; *National Labor Relations Board* v. *Bradford Dyeing Ass'n,* 310 U. S. 318, 339–340.

---

the *Virginian Railway* decision to cases where the number of employees participating in the balloting warrants the assumption that the results of the election represent the wishes of the entire unit. See *Matter of S. A. Kendall, Jr.*, 41 N. L. R. B. 395, 397; *Matter of Bernard Gold and Jacob Wasserman*, 55 N. L. R. B. 591–592, in each of which only one of the three employees in the respective units voted in the elections. In the instant case, the Board, as appears from its decision (R. 95), conducted an independent investigation following the balloting, to ascertain whether the election was fair and representative. It found that it was (*ibid.*). Moreover, the record in the instant case indicates (R. 62), as the Board found (R. 95), that petitioner has a high rate of turnover among its employees, so that a substantial number of those whose names appeared on the eligibility pay-roll list were no longer employed by petitioner at the time of the election.

The court below pointed out that the employer in the instant case claimed that the change in personnel was created while the Board delayed filing a petition for enforcement but that the employer had made no move during this delay to raise the issue either by a petition to the Board to adduce additional evidence of a change in personnel or by a petition to the court to review and set aside the Board's order. The court properly held that the case fell directly within the principle enunciated in the *Frank Brothers* case, in which this Court (at pp. 704–705) noted with approval the Board's view that "a requirement that union membership be kept intact during delays incident to hearings would result in permitting employers to profit from their own wrongful refusal to bargain," and that the Board "might well think that, were it * * * [to] order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation," and held "That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement."

National Labor Relations Board v. *Fansteel Metallurgical Corporation*, 306 U. S. 240, upon which petitioner seeks to rely (Pet. 20–21), is not in point. In that case, it was conceded that the union majority depended upon a definite group of employees who had engaged in a sit-down strike. When the Court ruled that the employer's discharge of these strikers was valid, the union majority was obviously dissipated. In the instant case there is no concession that the union majority depended upon the employees who left petitioner's employment. This Court in the *Frank Bros.* case sharply distinguished the *Fansteel* case from the situation there presented.

CONCLUSION

The decision of the court below is correct and there is neither a conflict of decisions nor any important question warranting review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,

RUTH WEYAND,
MARGARET M. FARMER,
Attorneys,
National Labor Relations Board.

FEBRUARY 1945.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

> SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.
>
> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and

by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2.

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an em-

ployer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or

otherwise, and may take a secret ballot of employees, or ultilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order. * * *

The pertinent provisions of the Constitution of the United States are:

ART. 1, SEC. 8.

Congress shall have Power * * *

* * * * *

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;- And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U. S. GOVERNMENT PRINTING OFFICE : 1945